No. 18-

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 2018

LARRY LAMONT WHITE

Petitioner,

v.

COMMONWEALTH OF KENTUCKY,

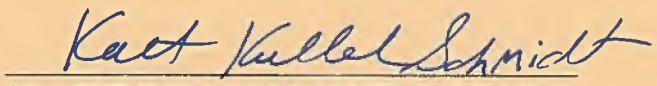
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF KENTUCKY

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

CAPITAL CASE

Respectfully Submitted,



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REPLY

1. White had two IQ scores from which intellectual disability could be determined. Remand for an evidentiary hearing is appropriate.

Respondent's Brief in Opposition states that neither White's IQ score of 76 nor the IQ score of 73 are valid to determine intellectual disability.

The Respondent says White did not present the 73 IQ score in his motion to exclude death. That is not the complete picture of the record. As White pointed out in his petition for certiorari, his trial counsel attached the 50 pages of testing (done when White was 12) which contained the Otis Test and the resulting IQ score of 73 to the Motion to Exclude Death. While counsel did not specifically mention that score in the motion, the 50 pages of testing is referred in the Motion to Exclude Death as Exhibit B. The motion specifically refers to other evidence in the testing regarding a head injury White suffered. The trial court was on notice to consider the entire testing results.

The Respondent says this Court should not consider the 73 IQ score because the Kentucky Supreme Court did not. However, the Kentucky Supreme Court should have considered it. In his direct appeal brief, White submitted to the Kentucky Supreme Court the same 50 pages of intellectual disability evidence he presented to the trial court. Included were his IQ scores of 73 on the Otis Quick-Scoring Mental Ability Test (Otis) and his 76 on the original Weschler Intelligence Scale for Children (WISC). White also argued on appeal that the SEM and the Flynn Effect should be applied to lower his IQ scores. Prior to oral argument on appeal, Petitioner filed a

Motion for Leave to Cite Supplemental Authority and reminded the Kentucky Court not to overlook Mr. White's lower IQ score of 73.

With regard to White's WISC score of 76, the Respondent argues the score is out-of-date and unreliable. Of course the test is old. It was given in 1971. This does not invalidate the resulting score on its face. One of the cornerstones of assessment of intellectual disability in the medical community is that it presents before the person is 18 years old. *Hall v. Florida,* 572 U.S. 701, 134 S. Ct. 1986, 1994, 188 L. Ed. 2d 1007 (2014). The Respondent's argument would mean no older person whose testing occurred decades ago in childhood could demonstrate intellectual disability.

Furthermore, part of the rationale for barring the execution of intellectually disabled persons is the concept of diminished culpability for the offenses committed. See *Atkins v. Virginia,* 536 U.S. 304, 317, 122 S. Ct. 2242, 2250, 153 L. Ed. 2d 335 (2002). While White's testing was done when he was 12 years old, his offenses were committed in 1983 when he was only 25 years old. He was not charged and tried until decades later. However, if he had been charged immediately, the efficacy of his testing would have been viewed in a different light.

The Respondent also argues the Otis IQ score of 73 is not reliable enough to be considered. The Respondent admits she could find little evidence about that test. The Respondent's arguments actually support White's request for a remand for an evidentiary hearing. Reliability of a test is a factual question that should be addressed at such a hearing. At a remand, White would have the opportunity to present evidence from the medical community about the test itself, his testing and

the result specifically. How this IQ score relates to a finding White is intellectually disabled would also be possible. A question of reliability is not a reason to deny certiorari. Certiorari is about whether a legal issue should be addressed and here, this Court must assume the test scores were reliable since the state court did not reject the claim based on unreliability of the IQ scores.

In fact, an opportunity to present evidence on the tests taken by White because of the potential variations of each test and how it is given. "The Hall Court warned that '[a] State that ignores the inherent imprecision of [IQ] tests risks executing a person who suffers from intellectual disability.' That risk lurks here." *In Re Cathey*, 857 F.3d 221, 237 (5th Cir. 2017).

The Court of Appeals for the Ninth Circuit has rejected some of the arguments the Respondent has made about White's two IQ scores in terms of age of the tests:

> It is highly unlikely, however, that the people administering an IQ test to a child would ever anticipate the use of that test in an *Atkins* proceeding, and at the time of Smith's tests the constitutional right provided by *Atkins* did not even exist. Consequently, records of childhood IQ tests will rarely include the detailed information collected for IQ tests administered under court supervision to adjudicate a defendant's *Atkins* claim. To discount what may be the only evidence of subaverage general intellectual functioning prior to age eighteen on this ground would effectively deny the protection afforded by *Atkins* to individuals who are substantially older than eighteen years old, or whose trials predate *Atkins*, because it would render their intellectual disability nearly impossible to prove. Given the evidentiary challenges so often arising from the retrospective nature of *Atkins* claims, the Eighth Amendment requires that courts apply a more relaxed standard when determining the reliability of evidence documenting childhood onset of intellectual disability. Here, there is no indication that Smith was malingering when he took the Otis tests. Accordingly, although they do not provide a presumption of intellectual disability under Arizona law, we find that Smith's first Otis test score nonetheless "serve[s] as evidence of mental retardation, to be considered by [this] [C]ourt with all other evidence presented.' " [cites omitted].

Smith v. Ryan, 813 F.3d 1175, 1186 (9th Cir. 2016), as corrected (Feb. 17, 2016).

The assertion that because the version of the WISC that White was given has been held by the Court of Appeals for the Ninth Circuit, in *Larry P. by Lucille P. v Riles*, 793 F.2d 969 (9th Cir. 1984), to be an invalid basis to classify children in school does not mean he should be executed without an evidentiary hearing to determine if he is intellectually disabled where the score on its face is one point over 75. The two inquiries about how that test should be viewed are completely different and are aimed at different goals and at preventing different harms. White would point out *Larry P.* was decided almost 35 years ago, decades before *Atkins* was decided. Additionally, if that test is not reliable, it is possible his true IQ was less than 76. Adjusting for the SEM, it would then be in a range that includes under 70.

In any event, under *Hall*, White's IQ of 73, adjusted for the SEM, places him in the 68-78 range. Thus, a full inquiry, including an inquiry into adaptive functioning should have been considered.

In *Moore v. Texas*, 137 S. Ct. 1039, 1050, 197 L. Ed. 2d 416 (2017), this Court held, "Here, by contrast, we do not end the intellectual-disability inquiry, one way or the other, based on Moore's IQ score. Rather, in line with *Hall*, we require that courts continue the inquiry and consider other evidence of intellectual disability where an individual's IQ score, adjusted for the test's standard error, falls within the clinically established range for intellectual-functioning deficits." *Moore* did not cut off the state's duty to assess Moore's intellectual disability based on the quality or reliability of the test given.

It is ironic the Respondent claims the 76 score is one point too high to cross the threshold criterion to inquire about adaptive functioning or remand for an evidentiary hearing when it has taken an inconsistent position in another recent capital case. In Michael St. Clair's capital case, at a time where St. Clair's available IQ scores were 77 and 79, the Commonwealth agreed to a remand for an evidentiary hearing. This is despite making some of the same arguments on the Flynn Effect it makes here. See Response to 60.02/60.03 and RCr 11.42 Intellectual Disability Claims, attached at Appendix A1-6 .

White argues he should have the opportunity to present scientific evidence of how the Flynn Effect would apply to his case. *Moore* holds that that clinical norms under the AAIDD matter. That standard allows for the Flynn Effect in capital cases. American Association on Intellectual and Developmental Disabilities, *The Death Penalty and Intellectual Disability,* pp. 155-169 (Polloway, editor, 2015) (discussing the Flynn Effect and that IQ scores need to be adjusted in intellectual disability cases to address the Flynn Effect).

In *Smith, supra at* 1185, the defendant took the Otis Intelligence Scale Test[1] and received a score of 62. He was also given the test again six months later and got a score of 71 that an unrebutted expert attributed to the Flynn Effect. Citing the AAIDD, *True v. Walker*, 399 F.3d 315, 322–23 (4th Cir. 2005) and *Holladay v. Allen*, 555 F.3d 1346, 1358 (11th Cir. 2009), as well as its own jurisprudence, the Court of Appeals for the Ninth Circuit recognized both the existence of the Flynn Effect but

[1] It is unclear if that is the exact same Otis test White took. That is a subject for expert testimony.

also that the medical community recommends "correcting for the age of norms in outdated tests." The Court therefore held that, in light of the AAIDD and *Hall*, the Flynn Effect must be applied to IQ scores when a court determines if a defendant's IQ is low enough to establish intellectual deficits.

The Respondent cites cases that discuss the Flynn Effect in a clinical context. That is not the context in which this case exists. Other courts have either accepted the Flynn Effect or at least recognized that its application has been left as an open question. See *In Re Cathey*, supra at 227-8 n. 33 (11th Cir. 2017) ("We also note the Eleventh Circuit's recent conclusion that district courts, upon their consideration of the expert testimony, may apply or reject the Flynn Effect, which is a finding of fact reviewed for clear error. See *Ledford v. Warden, Georgia Diagnostic & Classification Prison*, 818 F.3d 600, 640 (11th Cir. 2016); see also *Walker v. True*, 399 F.3d 315, 322–23 (4th Cir. 2005) (directing district court to consider Flynn Effect evidence)."). In fact, in *Cathey*, in order to defeat a claim of dilatory raising of an ID claim, the State argued that the Flynn Effect was recognized in psychology articles 20 years before his first habeas petition was filed in 2003.

What these cases have in common was the opportunity of the defendant to convince a court by introducing expert testimony about both the Flynn Effect and how it relates to IQ scores and intellectual disability. White should have that opportunity.

Respondent's focus on adaptive skills suffers from the same flaw as that of the circuit court in *Moore*. *Moore* cautions that the focus must be on adaptive deficits because that is what the medical norm is.

"The medical community focuses the adaptive-functioning inquiry on adaptive deficits. E.g., AAIDD–11, at 47 ('significant limitations in conceptual, social, or practical adaptive skills [are] not outweighed by the potential strengths in some adaptive skills'); DSM–5, at 33, 38 (inquiry should focus on '[d]eficits in adaptive functioning'; deficits in only one of the three adaptive-skills domains suffice to show adaptive deficits); see *Brumfield*, 576 U.S., at ——, 135 S.Ct., at 2281 ('[I]ntellectually disabled persons may have 'strengths in social or physical capabilities, strengths in some adaptive skill areas, or strengths in one aspect of an adaptive skill in which they otherwise show an overall limitation" ' (quoting AAMR, Mental Retardation: Definition, Classification, and Systems of Supports 8 (10th ed. 2002)))." *Moore v. Texas*, 137 S. Ct. at 1050.

The focus must also be on whether there are deficits in the specific areas to which deficits are alleged; adaptive skills that do not refute those specific deficits or areas of deficits are, under *Moore* and under the AAIDD, irrelevant and cannot be considered. The fact that White earned a GED and was a plumber's helper does not refute the conceptual deficits academic testing revealed. At age 12, he read at a 2.4 grade level and did math at a 3.4 grade level. That is what must be considered in determining ID, not whether he managed to get a GED later or work as a plumber's helper. No evidence exists to show what the GED testing consisted of, he earned his GED, what reading level he would have need to achieve, or what tasks he specifically did when working as a plumber.

The same is true of whether White could function in the highly structured environment of a prison without services. What did that mean as a factual matter? It is equally unclear whether the pleading attributed to White at trial was composed wholly or even at all by him.

Having a large family and a child do not support a finding of social functioning. What family he had was something he had no control over. Neither does trying as hard as you can to get your life on track. What does that even mean in terms of his day-to-day functioning? Moreover, the context under which this proposed mitigation arose underscores the need for further inquiry into White's adaptive functioning. He refused to allow his attorneys to present mitigation. He was not able to interact with his lawyers in a socially productive manner. While there was an inquiry about the voluntariness of this decision, the fact that counsel did not indicate White could not understand and sign the waiver of mitigation voluntarily is not affirmative evidence a thorough inquiry was made on White's adaptive functioning.

Furthermore, the scant evidence again dictates a remand for a hearing on this subject.

CONCLUSION

For the above reasons and the reasons expressed in the petition, Petitioner White respectfully requests that the Court grant the petition for a writ of certiorari, vacate the judgment against him and remand for a full evidentiary hearing on whether he cannot be executed based on intellectual disability.

Respectfully submitted,

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APPENDIX

COMMONWEALTH OF KENTUCKY
BULLITT CIRCUIT COURT
NO. 92-CR-00010-002
Electronically Filed

MICHAEL ST. CLAIR MOVANT

V.

COMMONWEALTH OF KENTUCKY RESPONDENT

RESPONSE TO CR 60.02/60.03 AND RCr 11.42
INTELLECTUAL DISABILITY CLAIMS

** ** **

Comes the Commonwealth of Kentucky, by counsel, and submits the following response to St. Clair's claims he is intellectually disabled and ineligible for imposition of the death penalty under the United States Constitution and that he received ineffective assistance of counsel when his trial counsel failed to assert such a claim prior to his 2011 sentencing re-trial. While the Commonwealth believes St. Clair's claim of intellectual disability lacks merit, the Commonwealth believes he is entitled to a hearing, based upon the current state of the law, limited to the issues of what variables, if any, should be applied to his IQ scores and what evidence there is of any possible deficits in adaptive behavior. In light of its belief a hearing is necessary, the Commonwealth reserves a full discussion of the merits of claim for post-hearing briefing.[1]

[1] In acknowledging a hearing is necessary prior to addressing the merits of St. Clair's claim, the Commonwealth reserves its right to object to any and all requests

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As the Court is aware, Kentucky law has long precluded imposing a death sentence against persons with a "serious intellectual disability." KRS 532.130; KRS 532.140. Under KRS 532.130(2), a person has a "serious intellectual disability" when they have "significant subaverage intellectual functioning existing concurrently with substantial deficits in adaptive behavior" which "manifested during the developmental period." The statute further defines "significantly subaverage general intellectual functioning" as being an IQ score of seventy (70) or below. Long after Kentucky had precluded imposing a death sentence against intellectually disabled persons under state law, the United States Supreme Court held the execution of such persons violated the Eighth and Fourteenth Amendments to the United States Constitution. *Atkins v. Virginia*, 536 U.S. 304, 321 (2002). The Supreme Court left the states "the task of developing appropriate

At first blush, St. Clair's claim that he suffers a "serious intellectual disability" fails on its face as he acknowledges in his motion that he received two full scale IQ scores above seventy (70) in 2000. Specifically, in November 2000, Dr. Eric S. Engum administered the WAIS-III and reported St. Clair obtained a Verbal IQ of 81 and a Performance IQ of 80 for a Full Scale score of 79. Then, in December 2000, another WAIS-III was administered by the Kentucky Correctional Psychiatric Center and it reported a Verbal IQ of 76, a Performance IQ of 83, and a Full Scale score of 77.[2] As

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for expert witnesses to the extent the Commonwealth believes St. Clair fails to establish the reasonable necessity for such.

[2] It is believed St. Clair was evaluated on at least one subsequent occasion by KCPC, but there is no information in the record regarding that evaluation.

St. Clair does not have an IQ score of seventy (70) or below, he cannot show that he has "significantly subaverage general intellectual functioning" as defined in KRS 532.130(2).

In *Hall v. Florida*, 134 S.Ct. 1986 (2014), however, the United States Supreme Court found it impermissible that Florida had used a fixed-number IQ score of 70 in light of the standard error of measure (SEM) *to bar consideration of other evidence* bearing on the question of intellectual disability -- deficits in adaptive behavior. *Hall*, at 1996. The *Hall* Court held "that when a defendant's IQ test score falls within the test's acknowledged and inherent margin of error, the defendant must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits." *Id.* at 2001. *Hall* noted that an IQ score between 70 and 75 or lower is typically considered the cutoff IQ score for the intellectual function prong of the "mental retardation" definition. *Id.* at 1999, citing *Atkins v. Virginia*, 536 U.S. 304, 309, n. 5 (2002). *Hall* quoted the "Diagnostic and Statistical Manual of Mental Disorders," and stated, "Treating the IQ with some flexibility permits inclusion in the Mental Retardation category of people with IQs *somewhat* higher than 70 who exhibit significant deficits in adaptive behavior." *Id.* at 1999 (emphasis added).[3]

The Court in *Hall* held "that IQ test scores should be read not as a single fixed number but as a range" based upon the SEM. *Id.* at 1995. The Court further assumed the SEM was generally accepted to be plus or minus five points. *Id.* In *White v.*

[3] The United States Supreme Court has also just heard argument in the case of *Moore v. Texas*, No. 15-797, a case involving the standards to be used by the states in considering claims of intellectual disability.

Commonwealth, --- S.W.3d ---, 2016 WL 2604759 at *5 (Ky. 2016), the Kentucky Supreme Court held *Hall* was retroactive. It must, therefore, be applied in this case. As such, *Hall* requires that St. Clair's Full Scale IQ scores be looked at as a range rather than a static number. In other words, assuming the SEM of the WAIS-III tests St. Clair was administered in 2000 was plus or minus five[4], his scores should be viewed as a range of 74-84 for the November test and 72-82 for the December test.

Of course, St. Clair's test scores still remain above seventy (70) even when the full generally accepted SEM is applied. He, therefore, remains unable to satisfy his showing that he has "significantly subaverage general intellectual functioning" as defined in KRS 532.130(2). In apparent recognition of this short-coming, St. Clair argues "the 'Flynn Effect' must be applied to each IQ score to ascertain a person's true IQ." Amended Motion, p. 20. Contrary to St. Clair's argument, however, nothing in *Hall* mandates a court apply the "Flynn Effect" to an IQ score. *Hall* makes no mention of the "Flynn Effect" whatsoever. Likewise, no decision from the Kentucky Supreme Court has ever mandated the application of the "Flynn Effect" to the assessment of an IQ score.

As the Eleventh Circuit has recently noted "there is 'no uniform consensus regarding the application of the Flynn effect in determining a capital offender's intellectual functioning.'" *Ledford*, 18 F.3d at 636 quoting *Thomas v. Allen*, 607 F.3d

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[4] The SEM could be less than the assumed plus or minus five. It is also possible the measurement error should be reduced as a result of St. Clair's corroborating scores of 79 and 77 on the same test. *See Ledford v. Warden, Georgia Diagnostic and Classification Prison*, 818 F.3d 600, 641 (11th Cir. 2016).

749, 758 (11th Cir. 2010). Even the Ninth Circuit, recognized in *Smith v. Ryan*, 813 F.3d 1175, 1185 n. 14 (9th Cir. 2016) (cited by St. Clair), that "[c]ourts have taken a range of approaches with regard to the Flynn effect." Whether and how to apply the "Flynn Effect" is an issue for this Court to decide in light of any evidence presented regarding its acceptance in the medical community and application, if any, to St. Clair's 2000 IQ scores.

Finally, since the Commonwealth agrees a hearing is necessary to determine what variables should be applied to St. Clair's IQ test scores, the Court should also hear St. Clair's evidence of adaptive behavior deficits. While the Commonwealth does not believe St. Clair can establish a sufficient deficit in adaptive behavior, it appears his motion and attachments are sufficient to meet the low standard set forth in *Bowling v. Commonwealth*, 163 S.W.3d 361, 384 (Ky. 2005), of "produc[ing] some evidence creating a doubt as to whether he is" intellectually disabled to entitle him to a hearing.

To be clear, the Commonwealth in no way believes St. Clair is intellectually disabled and, therefore, ineligible for a death sentence. Rather, the Commonwealth simply believes the Court should conduct a hearing on this issue so the lack of merit of this claim is resolved for good.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was filed electronically this the 16th day of December 2016, with service upon counsel for St. Clair, Hon. David M. Barron and Hon. Katherine A. Blair, Assistant Public Advocates, Department of Public Advocacy, 5 Mill Creek Park, Section 101, Frankfort, Kentucky 40601.

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